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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 38

THOMAS E. POLLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

There were no formal opinions below. The order of the district court denying the motion to vacate judgment and sentence appears at R. 16–27, and its order denying the motion for leave to appeal in forma pauperis at R. 18. The order of the court of appeals denying the motion for leave to appeal in forma pauperis appears at R. 24.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1955 (R. 24, 31). The petition for a writ of certiorari was filed on July 8, 1955, and granted on February 27, 1956 (R. 32). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, when petitioner appeared before the district judge for sentencing on October 3, 1952, the court made a final and irrevocable disposition of his case.

2. If the answer to question 1 is "no," whether the district court still retained the power to impose a sentence when petitioner was again brought before the court in September 1954.

STATUTES AND RULES INVOLVED

18 U. S. C. (1952 ed.) 1702, 62 Stat. 778, provides:

Obstruction of correspondence

> Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U. S. C. (1952 ed.) 3651, 62 Stat. 842, provides:

Suspension of sentence and probation

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that

the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best. * * *

The period of probation * * * shall not exceed five years.

* * * * *

28 U. S. C. (1952 ed.) 1915, 62 Stat. 954, provides:

Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * * * *

28 U. S. C. (1952 ed.) 2255, 62 Stat. 967, provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or

is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * *

Rule 32, Federal Rules of Criminal Procedure, provides:

(a) *Sentence.*

Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) *Judgment.*

A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) *Presentence Investigation.*

* * * * *

(d) *Withdrawal of Plea of Guilty.*

* * * * *

(e) *Probation.*

After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 43, Federal Rules of Criminal Procedure, provides:

Presence of the Defendant

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * *

STATEMENT

On September 8, 1952, in the United States District Court for the District of Minnesota, petitioner in open court waived prosecution by indictment and consented to an information against him. The charge was the unlawful taking and embezzlement of a United States Treasury check, in the amount of $192.29, in violation of 18 U. S. C. 1702 (*supra*, p. 2) (R. 2, 3-4, 30). Upon petitioner's plea of guilty, imposition of sentence was deferred by Judge Joyce for pre-sentence investigation (R. 30).

On October 3, 1952, petitioner appeared before the court for sentencing, having been brought there on a writ of habeas corpus ad prosequendum from prison at Stillwater, Minnesota, where he was serving a state-imposed sentence (R. 4, 30). Judge Joyce stated that the probation report indicated that petitioner had taken a very active interest in the Alcoholics Anonymous organization in prison, and petitioner told the court that he contemplated continuation of this interest upon his release. In answer to a query, petitioner also told the court that he would have an opportunity of going before the parole board the following month. After perusing the probation report, the judge stated that he was impressed by the fact that petitioner, who had stolen the check after a two-week drinking spree, had later revealed what he had done to an officer of Alcoholics Anonymous and to the F. B. I. without any effort to minimize the offense. The court advised petitioner that, upon his release, he should join Alcoholics Anonymous immediately and carry out faithfully every ob-

ligation imposed upon him so that he could win his fight against alcoholism (R. 5). This colloquy then occurred (R. 5–6):

> The COURT. If you don't do those things, and if you want to revert to drinking, you will be back here again because you will commit some federal offense, and I won't be talking to you this way if you are ever before me again.
>
> So, good luck to you and I hope the parole board will give you an opportunity.
>
> That is all.
>
> [PETITIONER]. Thank you very much, sir.

At that point, the hearing terminated and the court turned to other business.

Later that day (October 3, 1952), after other criminal matters had been presented to the court, the government attorney reverted to petitioner's case, stating that he was not clear as to what disposition had been made. The court announced that there was to be probation for three years, to commence after expiration of the state sentence (R. 6). A judgment and order of probation (R. 6–8) was then entered (R. 30). It recites, *inter alia,* that petitioner had been advised of and had waived his right to counsel; that he had been convicted upon his plea of guilty; that the imposition of sentence is suspended; and that petitioner is placed on probation for a period of three years, to commence immediately after his release on the state charge from Stillwater Penitentiary.

Petitioner was released from Stillwater on November 26, 1952, and placed under the supervision of the United States probation officer (R. 28). Upon

report of the probation officer that petitioner had violated the terms of his probation, a bench warrant was issued and petitioner was taken into custody on September 15, 1954 (R. 8-10, 30). The following colloquy occurred in a hearing held on September 21, 1954 (R. 11):

> Mr. EVARTS [U. S. Attorney]. * * * [Petitioner] * * * is before the Court at this time and is not represented by counsel, is that correct?
>
> [PETITIONER]. That's correct.
>
> Mr. EVARTS. You understand you have the right to be represented by counsel?
>
> [PETITIONER]. Yes, sir, I do.
>
> Mr. EVARTS. Is it your desire to waive that right?
>
> [PETITIONER]. Yes, sir. It is.
>
> The COURT. What I am going to do in your case, because of the record, is to sentence you in the first instance: It's the judgment of the Court that you be confined in an institution to be selected by the Attorney General of the United States for a period of two years. That's all.
>
> Mr. EVARTS. Now, Your Honor, as you recall, the record shows that he was, sentence was imposed on October 3, 1952, and I would suggest to the Court that an Order be made setting aside the judgment and commitment that was entered at that time so that the record will now truly reflect the status of the events.
>
> The COURT. All right.

A formal judgment and commitment was then entered, reciting the sentence of imprisonment for two years and ordering that the judgment and order of

probation entered on October 3, 1952, be set aside (R. 12, 31).

On February 11, 1955, petitioner filed a motion to vacate sentence under 28 U. S. C. 2255, asking for his immediate release. The ground of the motion was that, since he was not present on October 3, 1952, when the court made its order subjecting him to probation for three years, his sentence of imprisonment for two years for what he calls "probation violation" was illegal and unconstitutional (R. 13–15, 31).[1] In denying this motion on March 23, 1955, the court stated (R. 16–17): "[Petitioner] was initially sentenced upon September 21, 1954, and the files and records in the case conclusively show that said judgment was within the jurisdiction of the court and the sentence imposed was valid and in accordance with law." On April 4, 1955, petitioner filed a notice of appeal, supported by an affidavit and a motion for leave to proceed in forma pauperis in which he alleged that he believed that he had a meritorious cause of action and that his appeal was taken in good faith (R. 17–18, 31). On April 18, 1955, the district court entered an order denying this motion "in all respects" (R. 18, 31).

On May 16, 1955, petitioner filed a motion for leave to appeal in forma pauperis in the Court of Appeals for the Eighth Circuit, and a supporting affidavit stating that he believed he was entitled to redress and that the appeal was taken in good faith (R. 19–23). In its order denying this motion on June 23, 1955, the court of appeals, after observing that the

[1] The full term of the sentence expired in September 1956.

district judge had already denied leave to appeal in forma pauperis, stated: "The Court has examined the original files of the United States District Court and after due consideration the motion for appeal in forma pauperis is denied" (R. 24, 31).

SUMMARY OF ARGUMENT

I

Petitioner erroneously assumes that the district judge made a final and irrevocable disposition of his case when he appeared for sentencing on the morning of October 3, 1952. The record of that hearing clearly shows that the judge decided against imposition of a presently effective sentence of confinement. It does not show additionally, as petitioner would have it, an intention not to suspend sentence. The judge said nothing which would provide even the slightest support for the conclusion that the court intended to permit a withdrawal of the prior plea of guilty, to dismiss the information, to acquit petitioner, or to take any other action inconsistent with the plain fact, accepted by all present, that petitioner stood convicted.

It appears to be petitioner's interpretation of the record of the above hearing that the court proposed to convict petitioner and to do no more than advise and warn him. But conviction without sentence or suspension of imposition of sentence is unknown to federal practice and unauthorized by the federal rules. The plausible interpretation, all factors considered, is that the judge indavertently failed to de-

clare expressly his intention to suspend imposition of sentence.

In any event, this interpretation is compelled by what promptly followed. A scant few hours later, the court unequivocally expressed its intention to place petitioner on probation. We concede that the order of probation which was thereupon entered was defective because the court failed to call petitioner back and to state to him in open court the facts recited in the court's written judgment and order. The net result was that the only formal disposition of the case which the court purported to make was invalid and that the case remained incomplete.

II

The remaining question is whether the trial court could complete the case by a sentence imposed almost two years later. It is firmly established by a long line of decisions that a trial court does not lose the power to impose a valid sentence because the sentence initially ordered was invalid or because of an initial inadvertent failure to impose any sentence. See especially *Miller* v. *Aderhold*, 288 U. S. 206. Indeed, one who has actually been confined under an illegal sentence and has successfully filed a petition for a writ of habeas corpus is not entitled to absolute discharge; his right is to have a correct judgment entered on the resentencing. *In re Bonner*, 151 U. S. 242. It is likewise settled that there is no fixed time limitation upon the power to correct a defective sentence, as evidenced by the cases which have held that

such power subsisted notwithstanding the end of a term of court. *E. g., Miller* v. *Aderhold, supra.*

There is nothing in this case to warrant an exception. Petitioner's suggestion that he was seriously prejudiced because he was not informed on October 3, 1952, that he was being placed on probation is insubstantial. Under the terms of the probation order which the court entered, petitioner was to go on probation for three years, such period to commence on petitioner's release from the state prison where he was then confined under an independent sentence for another offense. It appears from petitioner's own pleadings that he was released from state prison in November 1952, and that he knew at that time that there was an outstanding federal order placing him on probation. Thereafter, he was in regular contact with the federal probation officer. By his own statements, it appears that he consciously elected not to present an immediate challenge to the probation order, though he questioned its validity. There is little equity in the notion that petitioner could save the point that the original probation order was defective until such time as he was apprehended for violating it and thereupon claim that lapse of time estopped the court from entering a valid sentence for the offense of which he stood duly convicted.

ARGUMENT

INTRODUCTION

We do not contest the jurisdiction of the Court to consider the merits of this cause even though 28 U. S. C. 1915 (a) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies

in writing that it is not taken in good faith." While the district court denied "in all respects" a motion for leave to proceed in forma pauperis (a motion supported by petitioner's affidavit that his appeal was taken in good faith), it is doubtful that this amounts to a certification in writing that the appeal was not taken in good faith within the meaning of the statute.

Moreover, while such a certificate carries great weight, it is not necessarily conclusive. See *Wells* v. *United States*, 318 U. S. 257, 259–260; *Higgins* v. *Binns*, 204 F. 2d 327 (C. A. 9). By applying for leave to appeal in the court of appeals, petitioner, in effect, challenged the trial court's ruling as without warrant. And the court of appeals reviewed the merits in deciding to follow that ruling. A review by this Court of the denial of leave to appeal will also involve an examination of the merits of the underlying cause. Since the issues are narrow and since the sentence has already run, we suggest that little purpose would be served by remanding the case if the Court decides that leave to proceed in forma pauperis should have been granted. Our position is that petitioner's motion for vacation of his sentence was properly denied on the merits.

I

THE DISTRICT COURT DID NOT DISPOSE OF THE CASE ON OCTOBER 3, 1952

A case cannot be deemed at an end until some formal disposition, or at least some unequivocal declaration of the intended disposition, is made by the court.

"In a criminal case, final judgment means sentence * * *." *Miller* v. *Aderhold,* 288 U. S. 206, 210.

When petitioner appeared before the district judge for sentencing on the morning of October 3, 1952—an appearance which followed his plea of guilty and a pre-sentencing investigation—the expected disposition was a sentence or the suspension of imposition of sentence. There was no question before the court, indeed no suggestion of a question, as to the validity of the prior proceedings. Petitioner, a man already serving a sentence imposed by a state court, stood before the bar guilty of a serious offense, as acknowledged by his own prior plea. Thereupon, the district judge and petitioner engaged in a discussion of petitioner's problems (which appeared to have their root in drinking) and his history. The judge, by his words, manifested a decision to permit petitioner to return to society upon the expiration of his state sentence. That is clear. But the court did not purport to permit a withdrawal of the plea of guilty, to dismiss the information, to acquit the petitioner, or to take any other step inconsistent with the plain fact, accepted by all present, that petitioner stood convicted. That is equally clear. The upshot of the morning hearing was that petitioner was removed from the courtroom after hearing the court's advice and admonitions.

Petitioner declares that it is "clear" that the trial judge determined that neither imprisonment nor probation should be imposed (Br. 21). This statement is half-right. The intention to give petitioner a chance to obtain parole from the state authorities and to go forth and mend his ways was expressed. Noth-

ing was stated, however, one way or the other, as to suspension of imposition of sentence or as to probation.

The presumption, we submit, is that suspension of imposition of sentence was intended. The notion that a court would make a determination of guilt, obtain a pre-sentencing report, and order an appearance of the defendant for sentencing, yet purposefully fail to impose sentence or to suspend imposition of sentence, far from being the only rational interpretation as petitioner suggests, is implausible. So far as we are aware, there is no such practice known to the federal courts, and petitioner does not cite a single case in which it has been done. Rule 32 (*supra*, pp. 4, 5) plainly contemplates only two possibilities so far as the convicted defendant is concerned: the imposition of sentence (Rule 32 (a)) or probation (Rule 32 (e)).[2]

The plausible interpretation of the record made at the first October 3d hearing is that the court, as a result of oversight, failed to express a decision to suspend imposition of sentence. That a judge with a busy calendar before him might have such a lapse scarcely strains the imagination.

But one is not left to inference or speculation. The district judge stated his intention unequivocally, later the very same day, when his attention was drawn to the inconclusiveness of the sentencing hearing. We

[2] As indicated in Section 3651 of the Criminal Code (*supra*, p. 3), the defendant may be placed on probation when *execution* of the sentence is suspended or when *imposition* of sentence is suspended.

quote the colloquy between the government attorney and Judge Joyce (R. 6):

> Mr. HACHEY. Going back to the matter of Thomas E. Pollard who appeared this morning—I didn't quite understand that clearly—is there to be a probationary period after his release from Stillwater, or any type of sentencing?
>
> The COURT. It is to commence at the expiration of sentencing at Stillwater.
>
> Mr. HACHEY. Probation to commence after expiration of his sentencing at Stillwater—for how long?
>
> The COURT. Three years.

We concede that the ensuing probation order was invalid because petitioner was not present when the decision to place him on probation was first concretely stated (see Rule 43, *supra*, p. 5).[3] But we submit that the court's statements and the order which it entered on the afternoon of October 3 (R. 6–8) show conclusively that the court had not intended, on the morning of October 3, to take or imply any action inconsistent with placing petitioner on probation.[4] To accept petitioner's position on this branch of the case, one must suppose, first, that the district judge intentionally undertook a quite novel course of action (a supposition not compelled by the morning hearing and far less persuasive than the supposition that the judge inadvertently failed to make a full disposition

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[3] Cf. *Lewis* v. *United States*, 146 U. S. 370, 372; *Cook* v. *United States*, 171 F. 2d 567, 569 (C. A. 1), certiorari denied, 336 U. S. 926; *Anderson* v. *Denver*, 265 Fed. 3 (C. A. 8).

[4] This, of course, is further confirmed by the court's action in 1954, imposing the sentence "in the first instance" (R. 11).

of the case) and, second, that, without any intervening circumstance or explanation, he undertook, a scant few hours later, to undo that which he had just purposefully done.

We submit that no effective disposition of the entire case was made on the morning of October 3, 1952, and that the circumstances admit of only one reasonable conclusion—that the district judge inadvertently failed to pronounce, at the morning hearing, the sentence of probation which he undertook to prescribe in the afternoon. Since the defendant was not present on the second occasion, the case still remained incomplete.

II

THE SENTENCE IMPOSED IN SEPTEMBER 1954 WAS A VALID SENTENCE

We have argued above that the district court did not effectively dispose of the case in October 1952 and that, accordingly, its jurisdiction was not exhausted.[5] There remains the question whether, thereafter, there was such an unreasonable, inexcusable, and prejudicial delay that this Court, in the exercise of its supervisory jurisdiction, should hold that the district court lost the power to impose a sentence.[6]

[5] Petitioner's argument of double jeopardy fails, of course, if one rejects his premise that an irrevocable disposition of the case was made on the morning of October 3, 1952.

[6] Petitioner makes arguments both in terms of the Court's supervisory powers and in constitutional terms (relying on the due process clause and the right to speedy trial). But, as his brief implicitly recognizes, the crucial question from either standpoint is whether there was such gross prejudice to petitioner that the district court's normal power to impose sentence for crime must be deemed lost or forfeit.

That, of course, depends upon a full evaluation of the circumstances.

Petitioner repeatedly suggests that the district judge and the government's trial attorney acted with shocking disregard for petitioner's rights. We believe that such lapses as occurred in the matter of sentencing were technical and inadvertent. Whatever else may be said and whatever result this Court may reach, it should be recognized that what transpired was certainly not marked by harshness or by hostility to the defendant, and that, indeed, this case would not be here but for the fact that the district judge was disposed to show considerable leniency to a man who had a prison record and who was unquestionably guilty of a serious offense. It was in order to give petitioner another chance that the judge decided, on October 3, 1952, that he would refrain from imposing confinement and that he would leave the way clear for petitioner to seek parole from the state authorities. That is the starting point in this case, and it is not one to be ignored.

A few hours after the sentencing hearing, the government attorney, checking over his list of cases, quite properly advised the judge that he was not clear concerning the court's disposition of petitioner's case. At this point, the judge, apparently believing that he was only making explicit what he thought to be implicit in his earlier remarks, declared that petitioner was to be on probation after his release from state prison. Admittedly, the correct procedure would have been to require petitioner's return to the courtroom to hear the express terms of the proba-

tion. But, again, let it be recognized that if the court had said in the first instance what it apparently meant to say, but neglected to express, petitioner hardly could have complained. On the contrary, a defendant in petitioner's position could not have failed to regard a sentence of probation as extremely generous.

Petitioner suggests that he was seriously misled. We point out that the court's "Judgment and Order of Probation," dated October 3, 1952, directed the probation officer to deliver a copy of said judgment and order to the petitioner (R. 8). While petitioner's brief states (p. 12) that "[t]here is no showing that a copy of this order was ever delivered to petitioner," petitioner's pleadings affirmatively disclose that he was notified in November 1952, when he was released from state prison, that the district judge had placed him on three years' probation (R. 14). Petitioner did not go back to the district judge at that time to challenge the probation order or to seek clarification. This is not a case, therefore, in which a man, after a long interval, learns that there is an outstanding order—one affecting his freedom—of which he was never informed. During the entire time that he was out of prison, petitioner knew that there was an outstanding probation order directed to him. He was also in contact with the probation officer. According to his pleading, he doubted the validity of the order but elected not to challenge it (R. 14). In these circumstances, we do not believe that he can fairly claim that he was seriously prejudiced. Certainly, petitioner was not entitled to save the point that the

original probation order was defective and then to assert, when apprehended for its violation, that lapse of time estopped the court from entering a valid sentence.

In the absence of unusual and seriously prejudicial circumstances, there can be no doubt that a court's power to impose a valid sentence is not lost merely because it has ordered an invalid sentence, or has inadvertently failed to impose any sentence in the first instance.

The effect of a void sentence upon the court's power to act at a subsequent time was fully considered in *Miller* v. *Aderhold,* 288 U. S. 206, decided by a unanimous court. The accused in that case had entered a plea of guilty on December 10, 1930. Sentence was thereupon suspended and he was discharged from the custody of the marshal. On June 17, 1931, at another term of court, he was sentenced by another judge to four years' imprisonment. Attacking this sentence, the prisoner contended (1) that the original sentence constituted a permanent suspension of sentence, which made it invalid, and (2) that the trial court was without power to impose another sentence after expiration of the term of court at which the conviction took place. Assuming, *arguendo,* the correctness of the first contention, this Court disagreed with the second and held that the power to impose a valid sentence was not lost, even though there had been initial error. It stated (pp. 210–212):

> In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a

valid judgment. * * * If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence. * * *

The order here under review being ineffectual to confer immunity from punishment, the conclusion that such immunity existed must rest upon the bare fact that, without any saving provision, the term at which the accused was convicted but not sentenced had passed. But that foundation for the conclusion at once vanishes in the face of the rule that where judgment has not been pronounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. *Walker* v. *Moser*, 117 Fed. 230, 232. We conclude, in accordance with what we regard as the better view, that in a criminal case, where verdict has been duly returned, the jurisdiction of the trial court, under circumstances such as are here disclosed, is not exhausted until sentence is pronounced, either at the same or a succeeding term.'

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[1] In *Hammers* v. *United States*, 279 Fed. 265, 266 (C. A. 5), cited in *Miller* v. *Aderhold*, *supra*, 288 U. S. at 211, the court of appeals had held:

"The imposition of a void sentence is not an obstacle to the assumption by the court which imposed it of jurisdiction of the

The same essential principle was involved in *Bozza* v. *United States*, 330 U. S. 160, although there the interval between the initial imposition of the invalid sentence and the subsequent entry of a valid one was far briefer (five hours). Reiterating its rejection of the "doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogther, because the court committed an error in passing the sentence" (p. 166), the Court pointedly declared (pp. 166–167): "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."[8] For other cases involving application of the principle stated in the *Miller* and *Bozza* cases, see *McDonald* v. *Moinet*, 139 F. 2d 939, 941 (C. A. 6), certiorari denied, 322 U. S. 730; *Ellerbrake* v. *United States*, 134 F. 2d 683, 684–685 (C. A. 7), certiorari denied, 319 U. S. 775; *Ellerbrake* v. *King*, 116 F. 2d 168, 170 (C. A. 8); *Pratt* v. *United States*, 102 F. 2d 275, 277 (C. A. D. C.); *Zerbst* v. *Nahas*, 67 F. 2d 742 (C. A. 10); *Rosenwinkel* v. *Hall*, 61 F. 2d 724 (C. A. 7); *Ex Parte De Angelo*, 50 F. 2d 847, 848 (C. A. 6); *Rachmil* v. *United States*, 288 Fed. 782, 785 (C. A. 2), certiorari denied, 262 U. S. 751; *United States* v. *Wilfong*, 95 F. Supp. 897, 899 (W. D. Mich.).

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convict, in order that a legal sentence may be imposed. Where there is a conviction, accompanied by a void sentence, the court's jurisdiction of the case for the purpose of imposing a lawful sentence is not lost by the expiration of the term at which the void sentence was imposed. The case is to be regarded as pending until it is finally disposed of by the imposition of a lawful sentence."

[8] In *Bozza*, as in *Miller*, there was no dissent on the issue under discussion.

What holds true of an initial invalid sentence is likewise true (and for the same reasons) of an initial failure to impose sentence resulting from inadvertence or oversight: the case remains open and sentence may be imposed at a later date. As stated in *United States* v. *May*, 9 D. C. 512, 513, "* * * if the judge, by accident, mistake, or design, should fail to pass sentence during the term of the court at which the verdict was found, he may do so at a subsequent term, and so may any judge holding the same court."* To similar effect, see *Bryant* v. *United States*, 214 Fed. 51, 53–54 (C. A. 8); *Davis* v. *State*, 192 Ga. 648, 649; *Davis* v. *Commonwealth*, 230 Ky. 589; *Flint* v. *Commonwealth*, 114 Va. 820, 823; *State* v. *Graham*, 225 N. C. 217, 219.

It may be argued that petitioner suffered a disability as a result of the defect in the October 1952 proceedings, *i. e.*, he made himself amenable, beginning in November 1952, to the supervision of a probation officer who in fact lacked authority over him. But since petitioner consciously chose not to contest the probation order—had he done so, unquestionably the defect would have been cured at once and the entire situation clarified—there is little equity in the suggestion that the court was without power to correct the defect later. The circumstance that for a period of almost two years petitioner undertook to comply with an invalid probation order was a proper consideration for the court in deciding what sentence to im-

**Miller* v. *Aderhold*, *supra*, expresses approval of this rule (see the quotation from the opinion appearing at pp. 20–21, supra), although the case involved an invalid sentence rather than an initial failure to pronounce sentence.

pose (we note parenthetically that the sentence actually imposed was well below the maximum—two as opposed to five years—although petitioner was not a first offender); it does not go to the court's power.[10]

Indeed, the cases make it clear that a person actually *confined* under an illegal sentence is not entitled, if he successfully files a petition for a writ of habeas corpus or a petition to vacate sentence, to an absolute discharge; his right is to have a correct judgment entered on the resentencing. *In re Bonner*, 151 U. S. 242, 262; *Hammers* v. *United States*, *supra*, 279 Fed. at 266 (C. A. 5); *Bryant* v. *United States*, *supra*, 214 Fed. at 53; *Wilson* v. *Bell*, 137 F. 2d 716, 719–721 (C. A. 6); *McDonald* v. *Moinet*, *supra*, 139 F. 2d at 941; *Crowe* v. *United States*, 200 F. 2d 526, 529 (C. A. 6); *Biddle* v. *Shirley*, 16 F. 2d 566 (C. A. 8); *Cahill* v. *Biddle*, 13 F. 2d 827, 829 (C. A. 8); and see *Dowd* v. *Cook*, 340 U. S. 206, 209–210; *Mahler* v. *Eby*, 264 U. S. 32, 46. Nor may a prisoner claim double jeopardy under a habeas corpus release by reason of a void sentence; he may be arrested and prosecuted again. *Mitchell* v. *Youell*, 130 F. 2d 880, 882 (C. A. 4); *Bayless* v. *United States*, 147 F. 2d 169, 170 (C. A. 8), modified on other grounds, 150 F. 2d 236; *Robinson* v. *United States*, 144 F. 2d 392, 397 (C. A. 6),

[10] We point out that the court's original order of October 3, 1952, purported to place petitioner on probation for three years and that federal law permits probation for as long as five years (18 U. S. C. 3651, *supra*, pp. 2–3). If the effective imposition of sentence in this case had not taken place within a lesser period than these, far different questions would be presented. In saying that the court here plainly acted within its powers, we do not wish to be understood as saying that a court's power to correct sentence knows no time limitations.

affirmed on other grounds, 324 U. S. 282; *Bryant* v. *United States, supra,* 214 Fed. at 53. *A fortiori,* there was no bar to imposition of sentence in the instant case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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